Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Connect America Fund	)	**WC Docket No. 10-90**
	)	
A National Broadband Plan for our Future	)	**GN Docket No. 09-51**
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	**WC Docket No. 07-135**
	)	
High Cost Universal Service	)	**WC Docket No. 05-337**
	)	
Developing a Unified Intercarrier Compensation Regime	)	**CC Docket No. 01-92**
	)	
Federal-State Joint Board on Universal Service	)	**CC Docket No. 96-45**
	)	
Lifeline and Link-Up to the Federal-State Joint Board	)	**WC Docket No. 03-109**
	)	

COMMENTS OF CENTURYLINK

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INTRODUCTION AND SUMMARY

CenturyLink appreciates the opportunity to offer its views in response to the Commission's recent Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, which invite comments on proposals for comprehensive reform of the universal service and intercarrier carrier compensation system.[1] CenturyLink[2] supports the Commission's effort to develop and transition to sensible, comprehensive reform.

[1] *Connect America Fund*, WC Docket No. 10-90, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, *High-Cost Universal Service Support*, WC Docket No. 05-337, *Developing an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-

The National Broadband Plan[3] appropriately emphasized removing barriers to broadband deployment nationwide, and especially in high cost, rural areas where broadband investment is economically difficult to justify. CenturyLink has particular interest in intercarrier compensation and the support it has long provided for universal carrier of last resort ("COLR") service in high cost areas. It serves many rural, high-cost areas. 74% of CenturyLink's service territory is in low-density high cost environments, with fewer than 30 people per square mile. Providing voice service and deploying broadband networks in high cost and rural areas pose substantial challenges. Even maintaining the existing voice service network is uneconomic for many areas, absent long-standing universal service support mechanisms.

As a first step to comprehensive universal service and intercarrier compensation reform, the Commission can and should act to address arbitrage and abuse of the current intercarrier compensation regime. That includes each of the three interim intercarrier compensation issues raised in Section XV of the NPRM:[4] failure of some carriers to acknowledge their access obligations on voice traffic that originated in Internet protocol

45, *Lifeline and Link-Up*, WC Docket No. 03-109, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13 (rel. Feb 9, 2011) (*NPRM*). *See* Public Notice, 76 Fed. Reg. 11,632 (Mar. 2, 2011).

[2] As the Commission is well aware, on April 1, 2011, CenturyLink just completed its merger with Qwest. The merger of CenturyLink and Qwest was approved by the Commission on March 18, 2011. *Applications Filed by Qwest Communications International Inc. and CenturyTel, Inc. d/b/a CenturyLink for Consent to Transfer Control,* Memorandum Opinion and Order, FCC 11-47 (rel. Mar. 18, 2011). Qwest Communications International Inc. is now a wholly-owned subsidiary of CenturyLink, Inc.

[3] *Connecting America: The National Broadband Plan* (Mar. 16, 2010). *See also* News Release: "FCC Announces Broadband Action Agenda" (rel. Apr. 8, 2010).

[4] NPRM at ¶¶ 603-677.

and terminates on the PSTN or originated on the PSTN and terminates in IP ("IP-on-the-PSTN");[5] the growing problem of phantom traffic; and traffic pumping or access stimulation schemes. The number and seriousness of disputes about these three types of access arbitrage have grown sharply in recent years. CenturyLink agrees they warrant immediate Commission action, even while larger efforts continue on comprehensive reform of universal service and intercarrier compensation.

I. THE COMMISSION SHOULD RECONFIRM THAT INTERCARRIER COMPENSATION APPLIES TO IP-ON-THE-PSTN TRAFFIC.

A. The Commission Should Make Clear that Failure to Comply with Existing Intercarrier Compensation Obligations for IP-on-the-PSTN Traffic is Improper.

CenturyLink supports the NPRM's recognition that the Commission should act to reduce access and other intercarrier compensation disputes about IP-on-the-PSTN traffic. The NPRM claims there is "uncertainty" about the status of IP-on-the-PSTN traffic under the current access charge regime.[6] In reality, the uncertainty has been less about what the rules require, than about whether and when the Commission would act to reduce these disputes.

Similarly, although the NPRM notes that "the Commission has declined to explicitly address the intercarrier compensation obligations associated with VoIP traffic,"[7] the fact that the agency has not yet provided "clear resolution" does not mean that IP-on-the-PSTN traffic has ever been exempt from the Commission's long-standing

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5 The Commission should address IP-on-the-PSTN rather than interconnected VoIP more broadly.

6 NPRM at ¶ 604.

7 *Id.* at ¶ 610.

intercarrier compensation rules. The lack of clear guidance by the Commission has not given carriers freedom to pretend the rules are whatever they want them to be. Indeed, even the Commission's discretion does not give it complete freedom to reinvent the intercarrier compensation treatment of IP-on-the-PSTN traffic retroactively.

That necessarily and appropriately limits the options before the Commission. It should confirm "that IP-on-the-PSTN traffic is subject to the same intercarrier compensation charges -- intrastate access, interstate access, and reciprocal compensation -- as other voice telephone service traffic both today, and during any intercarrier compensation reform transition."[8] On a going forward basis, after comprehensive reform of intercarrier compensation and universal service, the Commission could adopt other, prospective rules. However, it makes no sense to treat IP-on-the-PSTN traffic differently from other voice traffic originated or terminated on the PSTN. It certainly makes no sense to attempt to change existing rules to immediate adoption of "VoIP-specific intercarrier compensation rates"[9] or "immediate adoption of bill-and-keep for VoIP,"[10] and it is highly doubtful that the Commission could justify such a change as an interim measure, whatever new rules the Commission may ultimately adopt as part of broader reform.

Carriers that fail or refuse to comply with intercarrier compensation obligations for IP-on-the PSTN traffic are acting unlawfully, and the Commission should make that clear. Some carriers claim the issue is unclear, in effect arguing that because the Commission has not stepped up to declare that the ESP exemption does not apply to IP-

[8] *Id.* at ¶ 618.

[9] *Id.* at ¶ 616.

[10] *Id.* at ¶ 615.

on-the-PSTN traffic, they are free to ignore dispute procedures, disregard tariff and contract terms, and withhold payment. A few carriers have engaged in even more creative self-help, by recalculating LEC bills after unilaterally dictating a new access rate for alleged IP-on-the-PSTN traffic. The Commission should not tolerate such abuse.

B. Classification of VoIP as "Information Services" or "Telecommunications Services" is Irrelevant for Intercarrier Compensation Treatment.

The NPRM asks whether the Commission must address the classification of VoIP services in resolving this issue.[11] The answer is no. It is unnecessary to determine the classification of VoIP to determine whether existing intercarrier compensation rules apply to IP-on-the-PSTN. It is sufficient to confirm that the ESP exemption does not apply to this traffic.

The issue is not whether VoIP is an "information service" or a "telecommunications service."[12] IP-on-the-PSTN is traffic, handed off by a telecommunications *carrier*, and delivered in conventional *TDM format* for termination on the PSTN. The use of IP technology in originating a call does not exempt that traffic from this aspect of the country's universal service system under the current rules. IP-on-the-PSTN traffic would be subject to the existing intercarrier compensation framework regardless of whether VoIP is ultimately classified as a telecommunications service or an information service. That makes sense, because, as outlined below, even if VoIP were

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[11] *Id.* at ¶ 618.

[12] *Id.* The statutory definitions are set out at 47 U.S.C. §§ 153(43), 153(46).

classified as an information service, the ESP exemption does not apply to IP-on-the-PSTN.[13]

Carriers that fail to pay access on IP-on-the-PSTN traffic -- or that invent new rate rationales for such traffic -- are acting unlawfully, seeking unfair competitive advantage, and undermining universal service and broadband deployment. Beyond that, they are showing contempt for the Commission by trying to dictate the direction of intercarrier compensation reform.

C. Access Charges are an Integral Part of Universal Service.

Under the current intercarrier compensation regime, access charges have played a critical role in supporting universal service to rural and high-cost areas. In fact, the nation's universal service system has been based *principally* on access charge revenues.

1. <u>Access Charges Are Essential to Support Universal Service</u>.

The Commission has expressly approved access charges as "just and reasonable,"[14] and they remain essential to support universal service to high-cost and rural areas. ILECs are compelled to serve uneconomic areas, and at geographically averaged rates. Access revenues account for the large majority of support for operating,

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[13] The Commission should also reconfirm that any intermediate technology does not change the nature of a call that both originates and terminates in TDM format. Even today, some carriers wrongfully assert that inserting IP into the middle of a PSTN-to-PSTN call renders it exempt from access charges.

[14] *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long-Distance Users; Federal-State Joint Board on Universal Service*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 at ¶ 41 (2000), *aff'd in part and rev'd in part*, *Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001), *cert. denied sub nom. National Ass'n of State Util. Consumer Advocates v. FCC*, 535 U.S. 986 (2002) ("*CALLS Order*").

maintaining, and upgrading the PSTN in high-cost and rural areas. As a universal service funding mechanism, reliance on access revenues predates the 1996 Act and creation of the universal service fund.

Even while subject to access charges, interconnected VoIP services have been growing rapidly. IP-originated voice is already becoming standard technology in the enterprise market. Today, one-fifth of the nation's fixed wireline voice connections are provided through interconnected VoIP.[15] 28% of residential fixed wireline voice connections are interconnected VoIP.[16] Cable telephony already counts 23.5 million customers, nearly all served by VoIP, and continues to grow rapidly.[17] Meanwhile, "conventional switched access lines" (traditional wireline telephone lines) decreased by 8% between June 2009 and June 2010 alone.[18] A growing percentage of carriers are also introducing IP technology in their services -- CenturyLink among them -- and the future direction of telecom technology is headed in that direction, as legacy voice networks are upgraded to broadband capable networks.

Until comprehensive universal service and intercarrier compensation reform is completed, and until transition to a new universal service system is completed, funding universal service relies on the Commission's long-standing access charge regime. If the Commission were somehow to give IP-on-the-PSTN traffic an exemption from the access rules, the impact on universal service and the PSTN would be real and immediate. It

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[15] Industry Analysis & Technology Division, Wireline Competition Bureau, *Local Telephone Competition: Status as of June 30* (Mar. 2011) ("*Local Telephone Competition Report*) at 2, 3 & figs. 2, 3.

[16] *Id.* at 8, fig. 6.

[17] *See* National Cable & Telecoms. Ass'n, *Operating Metrics as of Sept. 2010* (2011), *available at* http://www.ncta.com/Statistics.aspx.

[18] *Local Telephone Competition Report* at 2.

would undermine broadband deployment and investment, harm consumers, and only worsen regulatory uncertainty and disputes. Such a step would be arbitrary and unreasonable.

Of all of the nation's voice and broadband providers, none is more dedicated to rural America than CenturyLink. CenturyLink is both a recipient and a payer of access. Its COLR service territories include many rural, high cost areas. CenturyLink's local operations now cover a combined service territory of roughly 600,000 square miles. Yet based on current census data, fully 78% of CenturyLink's service territory has fewer than 50 people per square mile. 74% has fewer than 30 per square mile. 70% has fewer than 20. Only 6% of the company's footprint has a population of 100 or more people per square mile.[19] With so much rural coverage, CenturyLink's average line densities are very low -- averaging just 29 lines per square mile.[20]

Considering the magnitude of their service commitment to rural America, CenturyLink's universal service revenue is actually modest. Consequently, like other ILECs, CenturyLink has been obliged to continue relying heavily on access charges to provide the support necessary to serve high-cost and rural areas. Moreover, CenturyLink serves non-contiguous service areas spread among 37 states. Yet its local operations are compelled to provide service at statewide averaged rates, and, as the COLR, they must extend their networks to serve virtually any customer, even when it is plainly uneconomic to do so.

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[19] CenturyLink's overall population density average is about 82 people per square mile. AT&T's is about 217. Verizon's is about 528.

[20] In comparison, AT&T has a line density of 101 per square mile. Verizon's is 155.

A large percentage of CenturyLink's total capital expenditures necessarily is invested annually in network that is plainly uneconomic without the continued implicit support of access revenue. Even when comprehensive universal service and intercarrier compensation reform is completed, transition to the new regime will take time. In the meantime, access revenue remains an essential universal service mechanism that funds the PSTN, enabling universal voice service and broadband investment in much of America. Rural consumers want more investment in broadband deployment and upgrades. Until universal service is transitioned to a new regime, that investment is heavily dependent on universal service support long built into access revenue.

2. **The Commission Has Found VoIP Traffic Shares the Obligation to Support Universal Service.**

In the *USF Contribution Order*, the Commission concluded that providers of interconnected VoIP services must contribute to the federal universal service fund.[21] The public interest necessarily led to the conclusion that those providers share the obligation to provide the same universal service support as traditional voice service providers, and for very compelling reasons.

i. **Interconnected VoIP Providers Benefit From the PSTN.**

First, the Commission reiterated that all service providers that interconnect to the PSTN receive benefit from universal service. The public interest dictates that they share

[21] *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 at ¶ 34 (2006), *aff'd in rel. part, Vonage Holdings Corp. v. FCC*, 487 F.3d 1232 (D.C. Cir. 2007) ("*USF Contribution Order*").

the same obligation as other interconnecting service providers to support universal service funding systems.

> The Commission has previously found it in the public interest to extend universal service contribution obligations to classes of providers that benefit from universal service through their interconnection with the PSTN. We believe that providers of interconnected VoIP services similarly benefit from universal service because much of the appeal of their services to consumers derives from the ability to place calls to and receive calls from the PSTN, which is supported by universal service mechanisms.[22]
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> * * *
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> [I]nterconnected VoIP providers, like telecommunications carriers, have built their businesses, or a part of their businesses, on access to the PSTN. For these reasons, we find that the public interest requires interconnected VoIP providers, as providers of interstate telecommunications, to contribute to the preservation and advancement of universal service in the same manner as carriers that provide interstate telecommunications services.[23]

That result makes sense, because interconnected VoIP providers are "'dependent on the widespread telecommunications network for the maintenance and expansion of their business,' and they "directly benefit[] from a larger and larger network."[24] The Commission found it "therefore consistent with Commission precedent to impose obligations that correspond with the benefits of universal service that these providers already enjoy."[25]

Carriers delivering VoIP-originated traffic for termination on the PSTN or receiving TDM-originated traffic unquestionably benefit from interconnection to the

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[22] *Id.* at ¶ 43, *citing*, *e.g.*, *Universal Service Report and Order*, 12 FCC Rcd at ¶ 797.

[23] *USF Contribution Order* at ¶ 43.

[24] *Id.*, *quoting Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 428 (5th Cir. 1999), *cert. denied sub nom. Celpage, Inc. v. FCC*, 530 U.S. 1210 (2000).

[25] *USF Contribution Order* at ¶ 43.

PSTN in the same way as competing service providers. The voice calls of interconnected VoIP providers use the PSTN, and benefit from the PSTN, in the same way that traditional carriers' calls do. The minority of carriers that fail to honor access obligations on alleged IP-on-the-PSTN traffic just want to be exempted from this obligation for their own commercial advantage.

ii. Competitive Neutrality Compels that Interconnected VoIP Support the PSTN Through Access Charges.

Second, the *USF Contribution Order* recognized that the principle of "competitive neutrality" requires that interconnected VoIP providers contribute to universal service funding systems.

> Competitive neutrality means that 'universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.' As the Commission has noted, interconnected VoIP service 'is increasingly used to replace analog voice service.' As the interconnected VoIP service industry continues to grow, and to attract subscribers who previously relied on traditional telephone service, it becomes increasingly inappropriate to exclude interconnected VoIP service providers from universal service contribution obligations.[26]

The Commission also recognized that any other conclusion would distort the marketplace and encourage and reward regulatory arbitrage.

> Moreover, we do not want contribution obligations to shape decisions regarding the technology that interconnected VoIP providers use to offer voice service to customers or to create opportunities for regulatory arbitrage. The approach we adopt today reduces the possibility that carriers with universal service

[26] *USF Contribution Order* at ¶ 44, *quoting Communications Assistance to Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989 at ¶ 42 (2005) ("*CALEA Order*").

> obligations will compete directly with providers without such obligations.[27]

The Commission also "note[d] that the inclusion of such providers as contributors to the support mechanisms will broaden the funding base, lessening contribution requirements on telecommunications carriers or any particular class of telecommunications providers."[28]

The NPRM notes that some carriers are arguing that access does not apply to IP-on-the-PSTN traffic, simply because it originated in VoIP format. Their position is premised on giving interconnected VoIP providers preferential treatment. It seeks to exempt their IP-to-PSTN voice traffic from the obligation to support the PSTN that all carriers are supposed to share equally. It would create the ultimate example of regulatory arbitrage, distorting competition by giving IP-on-the-PSTN traffic a purely artificial regulatory advantage.

3. It Would Be Arbitrary and Capricious to Exempt IP-on-the-PSTN Traffic From the Access Charge Regime.

The Commission cannot find it in the public interest to allow carriers to avoid paying access charges on IP-on-the-PSTN traffic delivered to the PSTN, when it has already found the public interest requires that interconnected VoIP providers contribute to "the support mechanisms" of universal service.[29] Access revenues are an integral part of the mechanisms of universal service.

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27 *USF Contribution Order* at ¶ 44.

28 *Id.* at ¶ 45.

29 *Id.* at ¶ 44.

Having found that interconnected VoIP providers benefit from the PSTN in the same way as carriers, the Commission cannot reasonably find that the IP-originated voice traffic that they route for termination to the PSTN or that they received after it originates on the PSTN does not need to support universal service through the access regime. Moreover, having found that competitive neutrality requires interconnected VoIP providers to contribute to universal service funding, the Commission cannot reasonably find that IP-on-the-PSTN voice calls should be exempted when competing service providers are required to support the PSTN through access charges for their voice calls.

Exempting IP-on-the-PSTN traffic from access would be more than just bad policy. It would directly contradict established Commission rules and policy precedent. Granting an exemption would be arbitrary and capricious.

D. Under Existing Law, IP-on-the-PSTN Calls Are Subject to Access Charges.

The Commission should recognize that the ESP exemption has never applied to IP-on-the-PSTN traffic.

1. <u>The Commission's Intercarrier Compensation Rules Govern all Voice Traffic On the PSTN</u>.

The Commission's access charge regime ensures ILECs can "recover the costs" of originating and terminating other service providers' non-local telecommunications traffic.[30] ILECs have been required to look to other carriers for revenue to help cover the high costs of meeting government mandates to build, maintain, and upgrade ubiquitous local networks and to provide service at averaged, affordable rates. Under the

30 *CALLS Order* at ¶ 130.

Commission's rules, ILECs are expected to bill access charges to other carriers for all non-local traffic delivered to them for termination on the PSTN. The ESP exemption is a very narrow exception to that rule.

Access charges apply broadly. The Commission recognized that access revenue is necessary so that ILECs can recover costs of providing the ubiquitous local networks that make up the PSTN. As carriers-of-last-resort, ILECs are required to build, maintain, and operate their networks even in high cost and rural areas where it is uneconomic without access revenue. Carriers with large high cost areas like CenturyLink are especially reliant on access charges to invest in their networks. Without that revenue, they would have no choice but to reduce or stop investing in rural areas, eliminating hope of continued rural broadband upgrades and eventually compromising service quality and network capabilities.

In the *IP Enabled Services* proceeding, the Commission explained that the "cost of the PSTN should be borne equitably among those that use it in similar ways."[31] That means that "any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network."[32] Access charges apply the same to all carriers' voice traffic terminated or originated on the PSTN, regardless of whether that traffic is originated or terminated, respectively, in IP.

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[31] *IP Enabled Services NPRM* at ¶ 61.

[32] *Id.*

2. The ESP Exemption Does Not Extend to IP-on-the-PSTN Voice Traffic.

The Commission allowed ESPs a limited exemption from the access charge regime, because they are not carriers and do not use the PSTN in the way carriers do. In establishing that exception, the *Access Charge Reform Order* explained that ESPs should not be assessed access charges "solely because [they] use incumbent LEC networks to receive calls from their customers."[33] Specifically, it found that they do not "use the public switched network in a manner analogous to IXCs." It also found that the "characteristics of ISP traffic (such as large numbers of incoming calls to Internet service providers)" make them more like "other classes of business customers."[34] It found that "ESPs" are not carriers delivering calls to other carriers' subscribers on the PSTN. They are end users, akin to toll-free service subscribers, whose own customers use the PSTN to contact them to receive their information services. Early ESPs included first generation ATM machines and database subscription services like Lexis.

The Eighth Circuit expressly relied on this distinction in use when it upheld *Access Charge Reform Order*. The court pointed out that ESPs "do not utilize LEC services and facilities in the same way or for the same purposes as other customers who are assessed per-minute interstate access charges."[35]

The Commission has never intended the ESP exemption to apply to IP-on-the-PSTN traffic. Interconnected VoIP providers use the PSTN in the same way, and for the same purpose, as any traditional voice provider. When carriers route their calls to ILECs

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[33] *Access Charge Reform Order* at ¶ 343.

[34] *Id.* at ¶ 345.

[35] *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 542 (8^{th} Cir. 1998).

for termination, or receive calls from ILECs at origination, they are not acting as ESPs, and they cannot qualify for the ESP exemption.

3. <u>IP-in-the-PSTN Traffic Uses the PSTN in the Same Way as More Traditional Voice Services</u>.

IP-on-the-PSTN traffic is functionally the same as traditional TDM voice traffic on the PSTN, whether it were classified as information services or telecommunications services. As far as the PSTN is concerned, an IP-originated voice call (whether fixed or nomadic) is technologically no different from any call originated by a traditional telephone when terminated on the PSTN. When the ILEC receives an IP-originated call for termination on the PSTN, it is delivered by a carrier, not an ESP. It is delivered in TDM format, not in IP format. It is for all practical purposes indistinguishable from any conventional telephone call being routed to the ILEC for termination on the PSTN. Similarly, an IP-terminated voice call is technologically no different from any call originated by a traditional telephone when originated on the PSTN.

Since the functionality of IP-on-the-PSTN traffic is no different than traditional services while it is on the PSTN, the ESP exemption cannot justify giving it preferential regulatory treatment over other competitive services, solely because it used a different technology before being delivered to the PSTN for termination or after being originated on the PSTN. Interconnected VoIP providers "utilize LEC services and facilities in the same way [and] for the same purposes as other customers" subject to access charges.[36] Their calls impose the same burden on the PSTN, use the same facilities, and enjoy the same benefits from the PSTN as traffic from conventional carriers. Interconnected VoIP

[36] *Southwestern Bell Tel. Co.*, 153 F.3d at 542.

providers have no reason to expect that carriers bearing their traffic should contribute a lower share of support for the PSTN than everyone else.

E. The Commission Cannot Deem Interconnected IP-on-the-PSTN Traffic Subject to Existing Intercarrier Compensation Obligations Solely on a "Prospective Basis."

CenturyLink agrees that, where lawful agreements have been expressly negotiated between parties exchanging traffic, the Commission should not force parties to modify them retroactively. It would be wrong, however, to reward parties that have been improperly disputing -- or withholding payment on -- LEC access charges. The Commission may change its rules going forward, and, again, CenturyLink supports comprehensive reform of universal service and intercarrier compensation. The Commission cannot retroactively change what its rules already require.

AT&T once asked the Commission to give only "prospective" effect to a ruling on liability for universal service contributions on so-called "enhanced" prepaid calling cards.[37] The Commission properly found that universal service assessment applied to calls using the card, recognizing that the introduction of advertising or informational messages to the calling card platform did not render the service exempt from the obligation to support universal service. Citing "uncertainty" about its rules, however, the Commission gave its ruling only prospective effect.[38] The D.C. Circuit upheld the finding that access properly applied prospectively, but it expressly reversed and vacated

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[37] MCI had conveniently given itself a similar exemption from access for its Golden Retriever prepaid calling cards.

[38] *In the Matter of Regulation of Prepaid Calling Card Services*, 21 FCC Rcd 7290, 7305 ¶ 41 (2006) (subsequent history omitted).

as arbitrary and capricious the Commission's finding that the ruling should not have retroactive effect.[39] The Commission should not make the same mistake again.

II. THE COMMISSION SHOULD PROMPTLY ACT TO ADDRESS THE GROWING ABUSE OF PHANTOM TRAFFIC.

The Commission rightly recognizes phantom traffic as an arbitrage scheme that causes inefficiencies and waste, as carriers disguise the nature or source of traffic being sent to other carriers, in order to avoid or reduce access payments owed for that traffic.[40]

A. The Commission Should Adopt Rules to Prohibit Phantom Traffic.

The bulk of phantom traffic is not some inadvertent loss of information identifying the source of traffic. Rather, it is deliberate cheating by a carrier that is intentionally evading compliance with the Commission's intercarrier compensation rules. It undermines the foundation of universal service, and it distorts competition. Price cap carriers lose intercarrier compensation revenues tied to those minutes of use. Rate of return carriers have their traffic projections distorted. And carriers end up assessing higher access rates as a consequence of lost intercarrier compensation revenue. The problem is growing, and is particularly troubling for carriers serving high cost, rural areas or subtending other carriers' tandems.[41]

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39 *Qwest Services Corp. v. FCC*, 509 F.3d 531 (D.C. Cir. 2007).

40 NPRM at ¶ 605.

41 Frontier has described to the Commission that phantom traffic has grown to as much as 8% of traffic terminating on its network. Letter from Michael Saperstein, Frontier, to Marlene Dortch, FCC, CC Docket Nos. 01-92, 99-68, GN Docket No. 09-51, WC Docket Nos. 04-36, 05-337 (Dec. 21, 2010) at 1.

CenturyLink continues to police arbitrage traffic and identify ways in which carriers are routing traffic in a manner that is intended to disguise the traffic's actual jurisdiction. Currently, CenturyLink has many millions of dollars in dispute as a result of carriers' attempts to mask the accurate jurisdiction of a call. Some examples of the arbitrage CenturyLink has identified include:

- Routing non-local traffic subject to terminating access charges over local interconnection trunks to avoid the access charges and pay lower reciprocal compensation rates or even bill and keep. Routing non-local traffic over local interconnection trunks bypasses the capability of carrier systems ability to detect and properly bill in an automated fashion.

- Masking traffic that originates and terminates within the same state in a manner that causes the traffic to appear interstate or international in nature. Altering the originating calling number or engaging in improper routing schemes are done with the intent of avoiding intrastate access charges.

- IXCs terminating traffic either directly or indirectly to ILECs utilizing their wireless affiliate interconnections in an attempt to mask the traffic as wireless, so as to enjoy the larger local calling area (MTA) for jurisdictional purposes, or, even worse, a "default" bill-and-keep arrangement in the absence of interim rates. Either way, the appropriate access charges cannot be billed unless the ILEC detects the improper routing and manually bills for the traffic.

- Wireless carriers routing traffic over CLEC interconnection trunks in an attempt to exploit bill-and-keep arrangement negotiated by the CLEC and the ILEC for other traffic.

- Routing traffic to the largest tandem in the LATA to reach all third parties, even when the largest tandem does not serve the called NPA/NXX. This routing scheme is done to attempt to compensate only the first, lower cost tandem owner in the call path, while simultaneously avoiding transit charges from the tandem owner whose tandem serves the third party NPA-NXX.

B. The Prevalence of Indirect Interconnection Makes Phantom Traffic Rules Especially Critical.

The NPRM points out that billing records generally are created by the tandem that receives a call for delivery to a terminating LEC network.[42] They are also transmitted to terminating service providers for traffic delivered using IP protocols. But when the originating and terminating networks do not directly interconnect -- when they are delivered by a tandem transit provider -- traffic arrive for termination without appropriate identifying information.

For CenturyLink, although legacy Qwest's ILEC operations have only rarely exchanged traffic with competitive providers through foreign ILEC tandems, CenturyLink's other ILECs often subtend foreign ILEC tandems.[43] As a tandem owner, an ILEC creates and distributes call detail records to subtending carriers to facilitate intercarrier compensation. But as a subtending carrier, an ILEC relies upon call detail records generated by the larger ILEC tandem owners that it subtends. As a result of this network architecture, ILECs -- particularly those serving more rural, lower-density areas -- exchange traffic both directly and indirectly with competitive carriers (e.g., CLEC and CMRS carriers). Although ILECs prefer to exchange traffic on direct trunks with competitive carriers, many carriers refuse to establish direct network connections with mid-sized ILECs such as CenturyLink, especially in rural areas. Instead, CLECs and

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[42] NPRM at ¶ 622.

[43] Today, despite ongoing efforts to seek direct interconnections with competitive carriers, millions of minutes continue to flow through a foreign ILEC tandem each month, due to the unwillingness of some competitive carriers to establish proper trunking and network architecture, even in locations where CenturyLink owns tandems.

CMRS carriers chose to route the traffic through an intermediary transit provider, commonly without regard to the high traffic volumes involved.

Because many of the issues surrounding unidentified/phantom traffic occur with the exchange of indirect traffic, ILECs have allocated significant resources to reducing the indirect traffic volumes they exchange with competitive carriers. However, many ILECs (including CenturyLink's independent ILECs) face tremendous resistance during negotiations with CMRS carriers and CLECs to establish direct trunking, even when agreeing to permit indirect traffic routing for specified levels of traffic that do not exceed a usage threshold. In fact, even when a CenturyLink tandem exists within the LATA where traffic is originating or terminating, CenturyLink often finds itself exchanging traffic indirectly with competitive carriers, causing the traffic to flow through two tandems owned by two separate ILECs. [44]

C. The Commission Should Adopt the USTelecom Proposal on Phantom Traffic.

The NPRM notes that the current disparity in intercarrier compensation rates gives some service providers incentive to conceal or misidentify the source of traffic to avoid or reduce access payments to the terminating carrier.[45] There is a well-settled industry consensus about the need for rules to reduce the substantial amounts of phantom traffic that terminates on carriers' networks.

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[44] CenturyLink particularly has problems ensuring CLECs and CMRS carriers directly connect at the CenturyLink tandem(s) in LATAs where there is a larger BOC tandem within the same LATA. Without the proper tandem interconnections, all traffic exchanged between CenturyLink and the CLEC or CMRS carrier, including very high traffic volumes, must illogically and inefficiently flow through an intermediary tandem owner, even when the traffic is originating or terminating within a CenturyLink tandem serving area.

[45] NPRM at ¶ 620.

The USTelecom proposal presents a suitable solution for the large majority of phantom traffic problems.[46] Eliminating the problem entirely might be impractical, but the Commission can readily, and easily, eliminate a significant portion of the problem by adopting reasonable, straightforward rules.

USTelecom proposal is based on clear rules for all traffic originating or terminating on the PSTN -- regardless of whether that traffic terminates or originates, respectively, off the PSTN. The principles of the USTelecom proposal are straightforward. (1) Originating providers must transmit the originating ANI. (2) Providers must transmit without alteration the signaling received from other providers. (3) It is deemed an unreasonable practice for a provider to route traffic to disguise the originating jurisdiction or the identity of the responsible provider. (4) The N-1 carrier is responsible for performing an LNP query before passing the call to the local network of the N carrier. (5) The principle of the *T-Mobile* decision[47] extends to ILECs the ability to invoke with exchanging carriers the negotiation and arbitration processes under Sections 251 and 252 of the Act. (6) The Commission will aggressively enforce these obligations.

The Commission should hear and promptly resolve complaints about phantom traffic rule violations. In enforcing these rules, the Commission can hear complaints as it would with other proceedings alleging "unreasonable practices" or "unfair and deceptive practices," as it has always done.

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[46] *See, e.g.,* Letter from Glenn Reynolds, USTelecom, to Marlene Dortch, FCC, at Att. pp. 9-14, WC Docket No. 01-92 (Feb. 12, 2008).

[47] *Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, 20 FCC Rcd 4855 (2005).

D. The Commission's Proposed Phantom Traffic Rules Can Be an Acceptable Alternative, With Limited Adjustments.

CenturyLink prefers the USTelecom proposal, and there is value in the broad support that the association has gained. However, both companies support the Commission's proposed phantom traffic rules if the Commission extends its proposed rules to ensure they incorporate each of the same principles.

The NPRM's rules would require providers to "transmit the telephone number received from, or assigned to or otherwise associated with the calling party to the next provider in the path from the originating provider to the terminating provider," wherever feasible with the network technology.[48] The NPRM also appropriately finds that "telecommunications providers and entities providing interconnected VoIP services that originate interstate or intrastate traffic on the PSTN -- or that originate intrastate or interstate traffic destined for the PSTN -- are subject to the requirements. In adopting any order, the Commission should also make clear that the assignment of a telephone number that does not correspond to the actual physical location of the originating caller (such as with nomadic VoIP services) will not alter the actual jurisdiction of the call, including for rating purposes. As with other services using the PSTN, geographical end-points and not telephone numbers would be the proper determinants of whether a call is local versus non-local (or, for non-local traffic, whether interstate or intrastate access charges apply). Carriers may use telephone numbers as a surrogate for billing purposes, provided that, as in other contexts such as nomadic wireless usage, there must be an ability for carriers to ensure that billing accurately reflects jurisdiction.

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[48] NPRM at App. B (proposed 47 C.F.R. § 64.1601(a)(1)).

The NPRM's rules also rightly would prohibit altering, stripping, or omitting calling number information, "unless published industry standards permit or require altering signaling information."[49] The obligation to provide accurate signaling information from point of origination would apply regardless of whether the provider uses SS7, MF, IP, or "equivalent identifying information as used in successor technologies."[50]

Additionally, the NPRM's proposed rules fall short of the USTelecom proposal in some important respects. The Commission should adopt the association's related proposed rules tied to local number portability queries for phantom traffic and should expressly extend to ILECs the ability to invoke with exchanging carriers the negotiation and arbitration processes under Sections 251 and 252 of the Act, consistent with the *T-Mobile* decision.[51]

It is worth emphasizing the importance of extending the Commission's *T-Mobile Order* to ILECs. That order expressed a desire for ILECs and CMRS carriers to negotiate agreements to govern the terms and conditions of the traffic exchanged between their networks. This same rationale must also be applied to CLECs and is one of the key aspects of the USTelecom proposal. In order for terminating ILECs to attain full value of new signaling rules identifying the originating carrier, it is necessary for the ILEC to execute an agreement with originating CLECs. Some CLECs currently benefit

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49 *Id.* at App. B (proposed 47 C.F.R. § 64.1601(a)(1), (2)).

50 *Id.* at App. B (proposed 47 C.F.R. § 64.1601(a)(2)).

51 *Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, 20 FCC Rcd 4855 (2005).

financially by not having an agreement, so they prefer not to enter into the Section 251/252 process to achieve an agreement.

Like many ILECs serving many high cost areas, CenturyLink has identified CLECs terminating indirect traffic on their networks without an interconnection agreement in place. Although in some instances the originating CLEC has agreed to enter into an interconnection agreement, many choose to be unresponsive to negotiation requests. Many CLECs continue to leverage the *T-Mobile Order* as support for "stiff-arming" an ILEC request to negotiate, which allows CLECs to continue to avoid compensating the terminating ILEC.

E. The Commission Has Authority to Adopt Phantom Traffic Rules Governing Interstate and Intrastate Traffic.

The NPRM asks whether the Commission's jurisdiction over intrastate calls is sufficient to adopt phantom traffic rules governing intrastate calls.[52] CenturyLink believes Commission precedent establishes that it does.

The Commission has long recognized that intrastate call signaling is within its jurisdiction in the context of Caller ID. When Caller ID was first introduced, the Commission adopted exclusive federal rules and preempted any state regulations relating to end-user blocking of call signaling information.[53] The Truth-in-Caller ID Act[54] itself presumes such authority, as well as providing additional reinforcement to the

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[52] NPRM at ¶ 629.

[53] *See Rules and Policies Regarding Calling Number Identification Service -- Caller ID,* Memorandum Opinion and Order on Reconsideration, Second Report and Order and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd 11700 at ¶¶ 5, 79, 84-85 (1995).

[54] Pub. L. No. 111-331, codified at 47 U.S.C. § 227(e).

Commission's authority to prohibit intentional failure to properly identify, or intentional mislabeling, of calls. It is also worth noting that because the falsification of call records impacts all jurisdictions, it is impossible to separate intrastate from interstate jurisdiction.

F. The Commission Can Adopt Phantom Traffic Rules Together with Truth-in-Caller ID Rules.

The Commission can readily adopt phantom traffic rules while implementing rules to comply with the Truth in Caller ID Act. That law provides that

> "[i]t shall be unlawful for any person within the United States, in connection with any telecommunications service or IP-enabled voice service, to cause any caller identification service to knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value....[55]

The Act is not, by itself, a solution to the separate problem of phantom traffic, nor does it obviate the need.

The Act, passed last year, directs the Commission to issue implementing regulations within six months of enactment, or June 2011. The Commission recently issued a notice of proposed rulemaking for that purpose.[56] Both Truth in Caller ID and phantom traffic rules logically would belong in the same subpart of the Commission's rules, as both involve the proper labeling of calls. Both can be addressed together.

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[55] 47 U.S.C. § 227(e)(1).

[56] *Rules and Regulations Implementing the Truth in Caller ID Act of 2009,* Notice of Proposed Rulemaking, WC Docket No. 11-39 (rel. Mar. 9, 2001).

III. THE COMMISSION SHOULD ACT PROMPTLY TO ADOPT RULES TO ELIMINATE OPPORTUNITIES TO ENGAGE IN TRAFFIC PUMPING.

The NPRM also seeks comment on "revisions to our interstate access rules to address access stimulation, a form of arbitrage that, by some estimates, is impacting hundreds of millions of dollars of intercarrier compensation."[57] CenturyLink agrees with the NPRM that access stimulation, also known colloquially as "traffic pumping," is a very serious problem. It has resulted in outrageous claims by some irresponsible LECs for artificially inflated access charges. CenturyLink's Qwest operation, as a major IXC, has been particularly affected. It has triggered many disputes and lawsuits. In fact, as observed in the NPRM,[58] traffic pumping threatens to take an estimated $2.3 billion from IXCs and American consumers for traffic processed between 2005 and 2010, and the problem continues.[59]

CenturyLink supports the approach to resolution of the traffic pumping problem set forth in the NPRM. At the same time, however, the company also submits some recommended alternatives. In any case, the basic point is that traffic pumping is an unlawful practice, one that presents significant dangers to the public and the public interest, and one that must be terminated immediately.

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57 NPRM at ¶ 635.

58 *Id.* at ¶ 637.

59 *Id.*

A. Traffic Pumping is Unlawful.

The facts of the traffic pumping scheme are well documented on the record.[60] In essence, in traffic pumping, some rural LECs and their "business partners," (known as "free service providers" or "FSPs,") take advantage of what can be best described as a "perfect regulatory storm" in order to scam literally billions of dollars from the system. The rural LECs have very high tariffed interstate (and intrastate) access rates based on the premise that their access volumes are low and will remain low.[61]

Traffic pumping LECs and FSPs enter into contractual relationships whereby the FSPs offer free or below cost competitive services (conference calling, chat rooms, etc.) to the public. In order to reach these "free" services, FSP customers must access these services via toll calls terminated through the traffic pumping LEC's local exchange switch.[62] This artificially stimulates, and greatly expands, traffic to the LEC, and then the LEC and the FSP split the revenues that result when the LEC charges its artificially-high access rates to IXCs. As traffic volumes increase through the traffic pumping activity, so do the per-minute (and total) profits of the LEC, which are then shared with the LEC's

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[60] *Id.* at ¶¶ 635-77. *See also Qwest Communications Corp. v. Farmers and Merchants Mutual Telephone Co*., Memorandum Opinion and Order, 22 FCC Rcd 17973 (2007) ("*Farmers 1*"), Order on Reconsideration, 23 FCC Rcd 1615 (2008), Second Order on Reconsideration, 24 FCC Rcd 14801 (2009) ("*Farmers 3*"), *aff'd*, Third Order on Reconsideration, 25 FCC Rcd 3422 (2010) ("*Farmers 4*"), *pet. for rev. pending sub nom. Farmers and Merchants Mutual Telephone Company of Wayland, Iowa v. FCC*, filed May 7, 2010 (D.C. Cir. No. 10-1093) (*Farmers*); Iowa Utilities Board, Final Order, *Qwest v. Superior Telephone Cooperative, et al*., Docket No. FCU-07-2, Sept. 21, 2009 ("*IUB Order*").

[61] While rural ILECs and CLECs have different regulations governing their rates, their rates are all predicated on the assumption that rural carriers will have low volumes and, accordingly, higher per-unit costs.

[62] Legitimate providers of the same competitive services utilize 8XX numbers to access their services.

FSP partners. Because the scheme results in massively high monopoly profits, the rates charged are unreasonable and, in the context of the Communications Act, unlawful.

In a normal market, IXCs would simply decline to do business with a traffic pumping LEC, and the problem would solve itself. However, switched access[63] is not a normal market. In the case of terminating switched access, the LEC controlling the telephone number assigned to the called party is obligated to route the call.[64] Thus, when a toll caller dials the number of an FSP, the only entity that can terminate that call is the LEC controlling that number. IXCs do not have the ability to choose another more reasonably priced carrier to terminate calls to the FSP.

Nor do the IXCs have the ability to refuse to do business with the FSP or the traffic pumping ILEC. The Commission has ruled that calls to traffic pumping LECs cannot be blocked by the IXC.[65] Moreover, the Commission's rate averaging rules prohibit an IXC from passing on the exorbitant costs of delivering FSP traffic to traffic pumping LECs to those of its customers who make FSP calls, and instead must recover these costs from all of their customers through averaged rates.[66] Making matters worse, traffic pumping LECs are filing their tariffs on 15 days notice, making them, at least

[63] Traffic pumping schemes thus far have generally involved terminating access. However, some recent traffic pumping arrangements have been constructed to exploit originating access, especially in the area of 800 calling. References in CenturyLink's comments focus generally on terminating access schemes, which is the large problem. However, rules adopted by the Commission should address both terminating and originating access.

[64] *See Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001).

[65] *Establishing Just and Reasonable Rates for Local Exchange Carriers, Call Blocking by Carriers*, Declaratory Ruling and Order, 22 FCC Rcd 11629 at ¶ 1 (2007) ("*Call Blocking Order*").

[66] 47 U.S.C. § 254(g); 47 C.F.R. § 64.1801(b); *see also* NPRM at ¶ 654.

arguably, subject to the Commission's "deemed lawful" rules for fifteen day tariffs.[67] The Commission has thus far declined to suspend fifteen day traffic pumping tariffs, allowing them to take effect with the full protection of Section 204(a)(3) of the Act.[68]

The result is a situation where excessive rates are charged by traffic pumping LECs to captive IXCs required by the Commission to deliver FSP traffic to those LECs, a situation which is not only contrary to the Communications Act and the public interest, but which threatens to undermine the existing rural telecommunications and universal service infrastructure.[69] It is not getting better, and, indeed, has been exacerbated by the filing of "traffic pumping tariffs" by a number of CLECs (on 15 days notice),[70] and an FSP now owns a CLEC through which to conduct its own traffic pumping operations.[71]

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[67] *Farmers 1* at ¶¶ 8, 20.

[68] *See*, *e.g*., Public Notice, "Protested Tariff Transmittal Action Taken", WCB/Pricing File No. 10-10, DA 10-1970 (rel. Oct. 14, 2010) (denying the petitions to suspend or investigate of Qwest Communications Company, LLC and Sprint Communications Company, LP and allowing the Bluegrass Telephone Company, Inc. tariff revisions to become effective) ("Oct. 14, 2010 Public Notice"), *applications for review pending* (WC Docket No. 10-227). To be sure, CenturyLink believes that these tariffs were based on a fundamental illegality and are not entitled to "deemed lawful" protection. The Commission's failure to suspend the tariffs, however, adds needless complexity.

[69] CenturyLink agrees that traffic pumping could be resolved as part of comprehensive intercarrier compensation and universal service reform. However, resolving the traffic pumping problem is overdue and need not and should not be delayed by other issues within the intercarrier compensation proceeding.

[70] The Commission ruled in *Farmers 3* and *Farmers 4* that, under the tariff of Farmers and Merchants Telephone Company, traffic delivered to Farmers' FSP partners was not access traffic because they did not qualify as "end user subscribers" under the tariff. *Farmers 3* at ¶¶ 10-26; *Farmers 4* at ¶¶ 9-12. "Traffic pumping tariffs" purport to eliminate the end user subscriber requirement from the tariff. *See*, *e.g*., references to Bluegrass Telephone Company, Inc. tariff definitions and discussion in Qwest Communications Company, LLC Emergency Application for Review, WC Docket No. 10-227, dated Nov. 8, 2010, at 6-8.

[71] For example, the Nevada Secretary of State's public database shows David Erickson of FreeConferenceCall.com is also manager of Wide Voice, LLC, a California CLEC. *See*

This issue is not new. The Commission has already "f[ou]nd that [the] increased demand beyond some normal traffic growth level" -- *i.e.*, growth at the level associated with access stimulation -- "will likely result in rates that are unreasonable."[72] The Wireline Competition Bureau's Pricing Policy Division has likewise found that the bills generated by access-stimulation schemes are "inconsistent with the economies of scale generally accepted for local switching, tandem switching, or transport functions."[73] The *National Broadband Plan*, issued in March, described access stimulation as an "arbitrage" scheme that directs investment "to free conference calling and similar schemes … rather than to other, more productive endeavors," and it called on the Commission to "curtail business models that make a profit by artificially inflating the number of terminating minutes."[74] CenturyLink certainly endorses that call.

The Iowa Utilities Board (IUB), after a months-long investigation of access-stimulating LECs, found that "traffic pumping presents a situation where LECs bill IXCs for a monopoly service (access) and use a portion of the money generated from the monopoly service to support a competitive service (conference, chat, international, and credit card calling) that generates the abnormally high volume of incoming calls, forcing

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http://nvsos.gov/sosentitysearch/CorpDetails.aspx?lx8nvq=mwvGupNLst%252fd6TYUpg5BuQ%253d%253d&nt7=0.

72 *Establishing Just and Reasonable Rates for Local Exchange Carriers*, Notice of Proposed Rulemaking, 22 FCC Rcd 17989 at ¶ 22 (2007) ("*2007 Access Stimulation NPRM*").

73 *Investigation of Certain 2007 Annual Access Tariffs,* Order Designating Issues for Investigation, 22 FCC Rcd 16109 at ¶ 9 (Chief, Pricing Policy Division, 2007) ("*2007 Access Tariffs Designation Order*").

74 *Connecting America: The National Broadband Plan* at 142, 148, *available at* http://download.broadband.gov/plan/national-broadband-plan.pdf.

the IXCs to use and pay for the monopoly service."[75] Like the Commission, the IUB determined that "a carrier's willingness to share a substantial portion of its access revenue with [an FSP] is evidence that the carrier's rates are too high for the volume of traffic being terminated."[76] Moreover, "the 'free' conference calling service" facilitated by access-stimulating LECs "is not free at all, but is paid for by the IXCs," giving rise to "increased costs to Utahns [that] produce no significant benefit, if any benefit at all."[77] Simply put, access stimulation is a scam that harms customers, non-traffic-pumping providers, and the telecommunications market itself.

It is incumbent on the Commission to take immediate action to resolve traffic pumping, at least on a going-forward basis.[78]

B. The Approach Recommended in the NPRM Represents a Reasonable Hybrid of Conduct-Based and Rate-Based Solutions to Traffic Pumping.

Because traffic pumping is a creature of regulatory anomaly, there are potentially multiple ways of dealing with it. The two most commonly recognized are solutions based on conduct and rates. Namely, the Commission can either declare that traffic pumping (the sharing of monopoly revenues in order to subsidize a competitive service)

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[75] *IUB Order*. *See also* 47 U.S.C. § 254(k) ("A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition.").

[76] *IUB Order* at ¶ 57.

[77] Before the Public Service Commission of Utah, *Consideration of the Rescission, Alteration, or Amendment of the Certificate of Authority of All American to Operate as a Competitive Local Exchange Carrier within the State of Utah,* Docket No. 08-2469-01, Report and Order, issued Apr. 26, 2010 at 31.

[78] As is discussed below, some solutions will actually resolve the myriad of court and Commission proceedings dealing with bills that have already been rendered for artificially pumped traffic. The Commission should adopt an approach that ends the extensive traffic pumping litigation by confirming access does not apply.

is a violation of the Communications Act by itself, or the Commission can ensure traffic pumping LECs cannot charge rates higher than the nearest BOC's rate, appropriately curbing the financial incentive for the abuse.

The approach in the NPRM is a hybrid of the two approaches, establishing a "trigger" that is activated whenever revenue sharing begins, and thereafter acting to reduce the rates of the LEC to reasonable levels to account for the artificially stimulated traffic.[79] The NPRM's hybrid approach is not unreasonable. However, some forms of revenue or wealth sharing (particularly among companies with shared ownership) could still be feasible. Consequently, CenturyLink proposes some alternative approaches based on either a "pure" conduct-based solution or a rate-based solution.

1. <u>Conduct-Based Solutions Focus on the Fact that Traffic Pumping Violates the Act</u>.

i. Conduct-Based Approach to Traffic Pumping.

"Conduct-based" resolutions to the traffic pumping problem focus on the fact that the practice of traffic pumping violates the Act.[80] That is, while excessive switched accesses rates are the engine that drives any traffic pumping scheme, a conduct-based solution to traffic pumping focuses only on rates that are the result of the specific

[79] Given the size and scope of the traffic pumping problem, it is likely that some schemes will develop that artificially pump traffic but do not meet whatever definition the Commission develops. Much of this uncertainty can be eliminated by a proper focus on Section 254(k) of the Act, as explained below.

[80] As is described below, we believe that traffic pumping constitutes a current violation of the Act, even without the overlay of Commission regulations confirming this fact on a prospective basis. However, the Commission clearly has the authority to enact rules setting the parameters of unreasonable conduct that violates Section 201(b) of the Act.

practices that are defined to constitute traffic pumping. Traffic pumping violates the Communications Act and the Commission's rules in at least three ways:

- The rates charged by traffic pumping LECs are wildly excessive at the levels involved in a traffic pumping scheme.[81] In this context (that is, billing for artificially pumped traffic pursuant to tariff), the sharing of revenues in a traffic pumping scheme by itself constitutes an unreasonable practice outlawed by Section 201(b) of the Act.

- Section 254(k)[82] of the Act makes it unlawful for a carrier to subsidize competitive services with revenues from services that are not subject competition. Traffic pumping directly violates Section 254(k), whether the scheme is conducted, as is currently typical, through a business partner FSP or by the traffic pumping LEC itself.

- Billing an IXC for tariffed access charges for traffic delivered to a business partner, rather than an end user subscriber to the traffic pumping LEC's carrier services, violates both the current access tariffs of most LECs and the Commission's rules regarding access tariffs.[83]

In other words, the practice of traffic pumping, or of billing IXCs pursuant to tariff for artificially pumped traffic, violates the Act, and the Commission can take appropriate action to deal with this unlawful conduct. CenturyLink submits that, within the proper context of the limited definition they propose,[84] this approach is appropriate, because the law violations discussed above are patent. It is unlawful to tariff the

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[81] *See*, *e.g.*, *Farmers 1* at ¶ 25.

[82] 47 U.S.C. § 254(k).

[83] Efforts by traffic pumping LECs to modify their tariffs to specify that traffic delivered to their FSP partners have been challenged by IXCs, and the most important of these challenges are pending. *See* Oct. 14, 2010 Public Notice, *supra*, note 68; *Qwest Communications Company, LLC v. Northern Valley Communications, LLC*, File No. EB-11-MD-001 (Formal Complaint filed Jan. 7, 2011). It follows that, if artificially-stimulated traffic to a business partner is not covered by a LEC's access tariffs, it is a violation of the Act to bill for the processing of such traffic as if it were covered by those tariffs. *Farmers 3 at ¶ 26.*

[84] The definition of "traffic pumping" should be narrowly defined to encompass only traffic that violates the Act directly, or that results in unlawfully high rates.

processing of traffic to business partners (as appropriately defined here) as switched access. Traffic pumping in the limited sense defined herein (and in the NPRM) is indeed unlawful and a violation of the Act.

ii. Proposed Rules Based on Conduct.

A proper definition of traffic pumping, and legal responses to a declaration that traffic pumping constitutes an unlawful practice, takes these issues in mind. Because the unlawfulness of traffic pumping is so inextricably intertwined with both the tariffing and the cross subsidization issues, it would not be wise to attempt to outlaw revenue sharing per se—there are obviously situations where the sharing of revenues in a legitimate marketing arrangement can be appropriate. Proper rules define traffic pumping in a limited manner that recognizes both cross subsidization of competitive services and the basic unreasonableness of the rates underlying traffic pumping, and deal with it from this focal point. Drawing from Qwest's June 17, 2010 ex parte presentation in this docket, rules dealing with conduct can take the following paths:

Rule 61.xxxx

(1) For purposes of this section, the term "business partner:" shall include each of the following:

  (a) The LEC itself;

  (b) Any affiliate of the LEC; or

  (c) Any entity that pays the LEC no net compensation, or that receives net compensation from the LEC, in connection with the LEC's delivery of telecommunications traffic to the entity, or receipt of telecommunications traffic from the entity.

(2) For purposes of this section, all payments exchanged between a LEC and an entity, in cash or in kind, including any offsets, shall be considered to have been made ‘in connection with he LEC’s carriage of traffic to the entity except where the LEC can demonstrate that such payments were made as consideration for a separate service unrelated to the LEC’s provision of local service of exchange access to the entity.

<u>Option 1</u>: Codify that it is unlawful to apply tariffed access traffic to artificially pumped traffic.

(1) and (2) As above

(3) It shall be unreasonable and unlawful for a LEC to apply tariffed interstate switched access charges to an IXC in connection with the LEC’s carriage of traffic from the IXC to the LEC’s own business partner, or from the LEC’s own business partner to the IXC.

<u>Option 2</u>: Codify that interstate tariffs do not apply to artificially pumped traffic.

(1) and (2) As above.

(3) No LEC tariff for carrier’s carrier access charges filed pursuant to Section 69.5(b) of this chapter shall apply to traffic in connection with the LEC’s carriage of interstate traffic from an IXC to the LEC’s own business partner, or from the LEC’s own business partner to the IXC.

<u>Option 3</u>: Simply confirm that subsidizing competitive conferencing and other competitive services from revenues derived from interstate switched access by itself violates Section 254(k) of the Act. The same “business partner” concept used in approaching the tariff solution would be applied in the Section 254(k) context:

(1) and (2) As above, with “carrier” substituted for “LEC.”

(3) No carrier may use revenues from any service that is not subject to competition to subsidize services provided by a business partner of

that carrier that are subject to competition.

This approach is totally consistent with the language and purpose of Section 254(k). The bottom line is that the rate tariffed must be reasonable in light of the traffic processed.

2. <u>Rate-Based Solutions Focus on Improper Cross-Subsidization</u>.

Obviously, as the key to a traffic pumping scheme is the subsidization of one (competitive) service with revenues from a monopoly service, by definition the monopoly service must be overpriced in order for the scheme to work. Otherwise the FSP services would need to carry their own weight and there would be no revenues to share. In a rate-based solution, where the initial focus is on the LEC's tariffed access rates, the basic rate analysis reaches the same result whether the conduct of the LEC is otherwise lawful or not. That is, if a rural LEC's access traffic hits a level where the per minute rate is unreasonable, then the reason for the increase in traffic is completely irrelevant to the fact that the rate itself is not lawful. In reviewing rate-based solutions, it is not necessarily relevant to determine whether the LEC's high access rates are caused by traffic pumping or by some other factors.

A rural LEC's access rates, which are reasonable based on the low volumes of traffic assumed in setting the rates, become wildly unreasonable when the volumes of traffic typical in a traffic pumping scheme are processed and billed.[85] Thus, a strictly rate-based solution would focus on the rates of the LEC irrespective of the nature of the LEC's conduct, which is precisely what the Commission did in the *Farmers I* decision,

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[85] *See*, *e.g.*, *Farmers 1* at ¶¶ 4-6, 14-25.

which was released before the full extent of the traffic pumping activities of that particular LEC defendant were known to the Commission.[86] That is, the Commission simply found that, as the LEC's rates were rate-of-return regulated, and the addition of the artificially stimulated traffic created a violation of the prescribed rate-of-return, the interstate switched access rate of the LEC was unlawful from the outset.[87]

A clear case of a rate-based solution is found in the ex parte presentation of a broad coalition of interests seeking resolution of the traffic pumping problem filed on October 8, 2010 (Joint Parties ex Parte).[88] The Joint Parties ex Parte, focusing on CLEC traffic pumping, addressed the fact that rural CLECs claimed the right to engage in traffic pumping with apparent impunity because their rates were not rate of return regulated (or subject to evaluation based on an earned rate of return).

The proposed solution was based entirely on a usage-based trigger of 406 minutes of use per month, per line — a CLEC with more than an average of 406 minutes of use per line per month would be ineligible for treatment as a rural LEC or for use of a rural ILEC as a benchmark for establishment of its own switched access rates.[89] Once this threshold was reached (a very liberal threshold based on the 99th percentile of NECA band eight carriers), the CLEC's benchmark would revert to the switched access rates of the BOC (or other large non-rural carrier in the absence of a BOC) in the state. If a CLEC files a new tariff under the revised benchmark, it may not make a further filing under the old benchmark for another year, thus reducing the risk that a CLEC could try to

[86] *Id*. at ¶¶ 21-25.

[87] *Id*. at ¶ 25.

[88] The submitting parties, included Qwest Communications Company, USTelecom, ZipDX, Level 3, Verizon and AT&T, WC Docket No. 07-135.

[89] *See id*. (proposed Revised Rule 47 C.F.R. §§ 61.26(a)(6)(ii) and 61.26(d)).

manipulate its traffic pumping activities among multiple CLECs. Because the regulatory structure for a BOC's switched access rates essentially presumes that the rates in the tariff remain just and reasonable at any level of traffic per line (that is, that there are no excess monopoly profits available for sharing with a "business partner"), the BOC rate provides a reasonable benchmark for a CLEC's tariffed switched access rate in a traffic pumping context.[90]

The key to this approach is that it is strictly mechanical—namely, if a rural CLEC's traffic levels hit a certain level, then the benchmark must be adjusted appropriately, no matter why the traffic increased. The approach is independent of the issue of whether the traffic pumping conduct is itself unlawful. It simply recognizes that, at a certain traffic volume level, a rural CLEC's access rates may become unreasonable no matter what the cause. The approach can also be applied to traffic pumping ILECs — the 406 minutes of use trigger could result in a traffic pumping ILEC being required to modify its tariffs as well.[91] Proper modifications to traffic pumping ILEC tariffs once this "trigger" is reached are discussed below.

3. <u>The NPRM Proposes a "Hybrid" Solution to Traffic Pumping that Can Resolve Current Traffic Pumping Issues</u>.

The NPRM proposes a solution to traffic pumping that is a "hybrid" of conduct-based and rate-based solutions. It establishes a "trigger" based on the conduct of traffic pumping, but then applies this trigger to the affected LEC's rates, rather than outlawing

[90] A BOC rate is a reasonable benchmark, provided the CLEC's benchmark is appropriately tailored to ensure that it includes only those functions that the CLEC actually provides.

[91] The BOC interstate access rates present a reasonable rate for any LEC in a traffic pumping situation.

the conduct or prohibiting the inclusion of artificially pumped traffic in the LEC's switched access tariffs. We would envision that the trigger would be based on a definition of traffic pumping, such as described in these comments. While a purely rate-based solution based on a usage trigger (such as 406 MOU per month per line) would also be reasonable, CenturyLink agrees with the NPRM that a hybrid solution such as is proposed can provide a meaningful solution to the traffic pumping problem.

As to the rates that would be required to be filed if the trigger were met, the NPRM proposes a simple solution for CLECs — a CLEC that meets the conduct-based trigger must reduce its rates to the level of the BOC serving the state or, in the absence of an BOC, the largest ILEC in the state. So long as care is taken to preserve the principle that a CLEC can only bill an IXC under tariff for services actually provided (that is, the applicable benchmark includes the ILEC rates for functions performed by the CLEC),[92] this approach is reasonable and should prove successful. BOC switched access rates are set at a level where they are reasonable at any traffic level, and hence a traffic pumping CLEC would not be able to gain monopoly profits through traffic pumping while charging the BOC switched access rates.

The NPRM's approach to ILEC rates once the trigger point has been activated is more complex, requiring that the affected ILEC file a tariff that is aligned with cost based upon projected pumped traffic.[93] In other words, the ILEC would be required to file a rate case. This is a reasonable approach, as any ILEC switched access rates that are reasonably in tune with costs will almost by definition deal effectively with the traffic

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92 *PrairieWave Telecommunications, Inc. Petition for Waiver of Sections 61.26(b) and (c) or in the Alternative Section 61.26(a)(6) of the Commission's Rules*, Order, 23 FCC Rcd 2556 (2008).

93 NPRM at ¶ 665.

pumping. It is for this reason that, after the Commission's first *Farmers* decision, in which a traffic pumping ILEC's rates were found to be unreasonable and unlawful because the artificially pumped traffic had resulted in a dramatic violation of the authorized rate of return for the LEC, and the Commission's *Traffic Pumping Tariff Decision*,[94] which required that ILECs leaving the NECA Pool with the apparent intention of initiating traffic pumping schemes justify their rates, ILEC traffic pumping was greatly reduced.

As the Commission is aware, ILEC traffic pumping has now been largely replaced instead by CLEC traffic pumping. Traffic pumping works only when the LEC is able to gain artificially inflated profits from its switched access services. Cost-based ILEC rates by definition do not result in monopoly profits, and most small ILECs are still rate of return regulated in their interstate access services (either directly or through participation in the NECA pool). Accordingly, requiring an ILEC that meets the traffic pumping trigger to adjust its rates to reflect its anticipated volumes generated by traffic pumping would greatly reduce the ability of the ILEC to engage in the practice in the first place.

As an alternative (and an ILEC could be given the choice), it is not necessary to actually go through the complex calculations suggested in the NRPM for ILEC tariffs. At the volumes generated by traffic pumping, the cost per minute of use of an ILEC providing switched access almost ceases to be relevant.[95] This is even more true because

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[94] *2007 Access Tariffs Designation Order*, 22 FCC Rcd 16109. *See also July 1, 2007 Annual Access Charge Tariff Filings*, Order, 22 FCC Rcd 11619 (2007).

[95] Additional traffic will ultimately result in switch exhaust and the need to purchase an additional switch. CenturyLink does not suggest here that switching costs are infinitely

most traffic pumping operations collocate the FSP bridge or other equipment in the traffic pumping LEC's central office, even further reducing the costs of providing access service.[96]

While the concept proposed in the NPRM is a good one, CenturyLink submits that adjusting the NPRM's proposal would yield a better approach. The Commission should ensure that an ILEC that meets the traffic pumping trigger is required to file new tariffs benchmarked to the same ILEC against whose rates a CLEC in the same state would benchmark its rates. At the traffic volumes involved in traffic pumping, the BOC rate would be more than compensatory to the ILEC.

All traffic pumping solutions are based on the recognition that traffic pumping works only because IXCs have no choice but to receive or deliver the traffic, and certain LECs can manipulate the system in order to charge grossly and artificially high rates for this monopoly service through traffic pumping. If IXCs had alternative means of accessing telephone numbers other than those controlled by the traffic pumping LECs, if the traffic pumping LECs were to charge just and reasonable access rates, or if IXCs had the choice of whether or not to deal with traffic pumping LECs, traffic pumping would not be an issue.

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incrementally zero; only that incremental costs of adding traffic to an existing switch are non-traffic sensitive.

[96] Some ILEC traffic pumpers have had the artificially stimulated traffic delivered through direct connections to the gateway, not routed to the actual switch listed in the LERG. Billing access in such instances is fraud.

C. Traffic Pumping Violates Section 254(k) of the Act Whether Undertaken by a LEC Alone or in Conjunction with a LEC's "Business Partner."

1. Introductory Analysis

The NPRM focuses on Section 254(k) of the Act as a deterrent to what might be called "internal" traffic pumping by a LEC — that is, traffic pumping whereby the traffic pumping LEC is also the provider of the "free" services (the FSP).[97] We agree that "internal" traffic pumping is a violation of Section 254(k) of the Act. We also agree that Section 254(k) applies to monopoly services (such as switched access) provided by CLECs as well as by ILECs. Furthermore, we submit that any traffic pumping scheme, whether internal or external, violates Section 254(k). Because past filings in related proceedings have shown a misunderstanding by some of these basic principles, we address Section 254(k) at some length. Basically, under current law, traffic pumping violates Section 254(k) of the Act, something that the Commission should confirm in this proceeding.

Section 254(k) of the Act provides that a "telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition." As explained above, traffic pumping results in a direct violation of this statute. Specifically:

- In a traffic pumping situation, a LEC (whether an incumbent LEC or a competitive LEC) is providing terminating or originating switched access as a monopoly service.
- This traffic pumping LEC is given ability to abuse misuse its position as switched access provider by the fact that the Commission has prohibited

[97] In an "external" traffic pumping scheme, the LEC and the FSP are different corporate entities.

interexchange carriers ("IXCs") from blocking traffic to traffic pumping LECs, thus making these IXCs particularly vulnerable to predatory practices such as traffic pumping.[98]

- At the traffic levels which occur in a traffic pumping situation, this monopoly service is provided at prices that result in exorbitant profit levels that can exist because of cross-subsidization by its access monopoly.[99]

- The conference-calling, chat-room, and other services that are used to generate the access traffic that is key to traffic pumping are quite clearly competitive services. In fact, this docket reflects the concern of legitimate conference calling companies that their ability to compete is being jeopardized by the practices of the "free" conference calling companies.[100]

- The artificial, inflated profits of the traffic-pumping LECs are being used to subsidize the operations of the conference calling and chat room service providers — who are able to offer their services for free (or at a nominal fee) because of their ability to share in the improper monopoly profits generated by the traffic pumping LECs.

- The conference calling and chat room providers are not "arms length" customers of the traffic pumping LECs. Instead they enter into contracts and agreements (generally secret) whereby they agree to jointly carry out the traffic pumping operation. For example, in one case, the Commission found, among other things, that the LEC and its service providers had entered into secret agreements, not available to other entities, and that the

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[98] *See Call Blocking Order*, 22 FCC Rcd 11629.

[99] The Commission has "f[ou]nd that increased demand beyond some normal traffic growth level will likely result in rates that are unreasonable," *2007 Access Stimulation* NPRM at ¶ 22, and has tentatively concluded "that a rate-of-return carrier that shares revenues, or provides other compensation to an end user customer, or directly provides the stimulating activity, and bundles those costs with access is engaging in an unreasonable practice that violates Section 201(b) and the prudent expenditure standard." *Id.* at ¶ 19. The Wireline Competition Bureau's Pricing Policy Division has likewise found that the bills generated by access-stimulation schemes are "inconsistent with the economies of scale generally accepted for local switching, tandem switching, or transport functions." *2007 Access Tariffs Designation Order* at ¶ 9. This analysis was set forth in detail in the first *Farmers* decision, in which the access rates charged by a rural ILEC were found to be unlawful because they earned a rate of return in excess of the prescribed rate. *See Farmers 1* at ¶¶ 24-25.

[100] *See* ZipDX *ex parte*, WC Docket No. 07-135 (filed Nov. 26, 2010).

> LEC had purchased specialized equipment and used specialized routing to carry the traffic at issue.[101]

In short, traffic pumping presents a clear case of cross subsidization of a competitive service by a service that is not subject competition, and thus falls squarely within the prohibition of Section 254(k) of the Act. The economics of traffic pumping are plain enough. A service is offered below cost in economic terms when its price is below its marginal or incremental cost. When an FSP offers a competitive service such as conference calling or chat room service for free, it is obviously pricing its competitive service below cost. The FSPs are able to survive only because their competitive services are being subsidized by other services that are not subject to competition.

2. **Section 254(k) Applies to any Carrier that Offers a Service that is not Subject to Competition.**

The NPRM asks whether Section 254(k) provides a basis for prohibiting revenue sharing in traffic pumping even within the same company.[102] Section 254(k) has broader application than that. In particular, the Commission should also note that Section 254(k) applies to CLECs, who generally do not possess market power in the retail end-user market, and who file non-dominant tariffs for terminating switched access. And it applies situations where the service being subsidized is not provided by the subsidizing carrier (and indeed is generally not provided by a carrier at all).

The Act's text and Commission precedent make clear that Section 254(k) applies to competitive LECs insofar as they offer non-competitive services such as terminating

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101 *See Farmers 3* at ¶¶ 14, 25.

102 NPRM at ¶ 659.

switched access. Section 254(k) is not limited to ILECs. It applies to any carrier that provides a service that is not subject to competition.

First, the language of the Act itself is clear. Section 254(k) provides that "a *telecommunications carrier* may not use services that are not competitive to subsidize services that are subject to competition."[103] The Act defines the term "telecommunications carrier" to mean "any provider of telecommunications services," and in turn defines "telecommunications service" to mean "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[104] As the 1996 Amendments make plain, Congress took care to assign rights and responsibilities to "telecommunications carriers" where it wished them to be broadly applied, and to limit responsibilities to LECs, or to incumbent LECs, when it wished them to apply more narrowly. Thus, for example, Section 251(a) sets out obligations that apply to all telecommunications carriers, whereas Section 251(b) lists obligations that apply only to some telecommunications carriers (namely, LECs) and Section 251(c) describes obligations that apply only to some LECs (namely, incumbent LECs). The Commission must reject any suggestion that Congress used the term "telecommunications carrier" in Section 254(k) but really meant to use the term "incumbent LEC."

Of course, Section 254(k) itself is limited, and only applies in the context of "services that are not competitive." Put differently, the prohibition is service-specific, not carrier-specific. A faithful application of Congress's language will not result in any overbreadth: Both ILEC and CLEC services are subject to Section 254(k)'s obligations

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[103] 47 U.S.C. § 254(k) (emphasis added).

[104] 47 U.S.C. §§ 153(43), 153(46).

only where there services in question are not competitive – for example, switched access where the IXC has no choice of whether or how to deliver a call to a particular number. Other situations where the services are subject to competition are not subject to 254(k), no matter what telecommunications carrier provides them.

Second, the Commission itself has recognized repeatedly that Section 254(k) applies to competitive LECs. In its very first order implementing Section 254(k), in 1997, the Commission took pains to "emphasize … that *all telecommunications carriers* remain subject to the statutory prohibition against cross-subsidy."[105] In case there was any doubt, the Commission reiterated this point in its 2001 *Business Telecom* decision. There, the Commission stressed its conclusion that "with respect to access to their own end users, CLECs have just as much market power as ILECs."[106] Finding that competitive LEC terminating access constituted a "bottleneck monopoly,"[107] the Commission rejected the claim that Section 254(k) did not apply to CLECs with the definitive ruling: "BTI [the CLEC] is subject to Section 254(k)'s prohibition against cross subsidization."[108] Subsequent orders have reflected the Commission's consistent view that competitive LECs enjoy a terminating access monopoly over calls to their customers, even when facing competition in other markets or for other services.[109]

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105 *Implementation of Section 254(k) of the Communications Act of 1934*, Order, 12 FCC Rcd 6415 at ¶ 9 (1997) ("*Section 254(k) Implementation Order*") (emphasis added).

106 *See AT&T Corp. v. Business Telecom, et al*., Memorandum Opinion and Order, 16 FCC Rcd 12312 at ¶ 21 (2001) ("*Business Telecom*").

107 *Id.*

108 *Id.* at ¶ 61. The Commission did not further resolve the Section 254(k) issue in *Business Telecom* because it required Business Telecom to reduce it rates (prospectively and retrospectively) to a level that would not support cross subsidization. *Id.*

109 *See, e.g.*, *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685 at Appendix C (Staff Analysis Appendix, 2005)

3. **<u>Cross-Subsidization Involving Multiple Parties is Prohibited by Section 254(k)</u>.**

Another claim made by traffic-pumping LECs hoping to escape liability under Section 254(k) is that the statute does not apply because the recipients of the subsidy—FSP conference call and chat room providers — are not carriers and are not affiliated by ownership with the subsidizing LECs.[110]

As is the case with the first objection dealt with above, this claim flies in the teeth of the language of the statute itself, even if the Commission has never been faced with this precise question before. Section 254(k) prohibits a telecommunications carrier from using revenues from a non-competitive service to subsidize a competitive service. The focus is on the service itself, not on who owns or provides the service. Indeed, there is nothing in the language of Section 254(k) suggesting that the competitive service being subsidized must be provided by the telecommunications carrier itself: the "services subject to competition" that a telecommunications carrier may not subsidize are not limited to the services of the telecommunications carrier itself.

Moreover, the relation between a traffic pumping LEC and its FSP partners has the attributes of a conspiracy, in which the actions of each co-conspirator are imputed to all of the other co-conspirators.[111] While one typically expects two distinct entities to

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("Competition at the retail level has not diminished the terminating access monopoly of the carrier selected by the called party."); *Access Charge Reform*, Eighth Report and Order, 19 FCC Rcd 9108 at ¶¶ 17, 119 (2004) ("[I]t is necessary to constrain the ability of competitive LECs to exercise this monopoly power.").

[110] By focusing on Section 254(k) in the context of "internal" traffic pumping, the NPRM implicitly gives some credence to this argument.

[111] *See Pinkerton v. United States,* 328 U.S. 640, 645-47 (1946).

interact at arm's length, such that one would not ordinarily cross-subsidize another, that expectation fails in the case of traffic pumping. In this case, two separate entities collude to generate unlawful returns, in violation of the Act and Commission rules – and, in doing so, effectuate cross-subsidies no less dangerous than if they were undertaken by a single entity. As discussed above, the FSP conference call and chat room providers involved in these schemes are not simple and innocent purchasers of services from traffic pumping LECs. If they were, there would be no incentive for the LEC (ILEC or CLEC) to share monopoly access revenues with them in the first place. To the contrary, the record reflects that they are full and knowing partners in every traffic pumping arrangement that has been thus far uncovered.[112] Indeed, evidence demonstrates that these providers conspired with the traffic pumping LECs to make it seem like they were customers of the LEC's tariffed services when they were not,[113] and in some cases went so far as to fabricate evidence to make it seem like they were in fact customers.[114] The conference calling and chat room providers were deeply involved in the traffic pumping schemes. There is simply no loophole in the Act for cross-subsidizing operations that use the device of multiple conspiring parties.

Indeed, in evaluating whether cross subsidization has occurred in the past, the Commission has long implicitly recognized that the harms caused by cross-subsidization can arise even if the subsidized and subsidizing products are not provided by the same

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[112] *See IUB Order* at 32-33, 38-39; *Farmers 3* at ¶¶ 10-11. *See generally, supra,* Part II.

[113] *Farmers 3* at ¶¶ 16-21.

[114] *Id.*

entity.[115] And, of course, this is the only logical position. The harms to competition that are caused by cross-subsidization of competitive services with revenues from services that are not competitive (the harms that Section 254(k) were meant to prevent[116]) are absolutely identical whether the perpetrators are single entities or conspiracies.

In short, there is no basis in law or policy for insulating "cross company cross-subsidization" from the scope of Section 254(k).

4. **CenturyLink's Proposal is Consistent with Section 254(k).**

By cross subsidizing competitive conference calling and chat room services with revenues derived from monopoly terminating access services, traffic pumping LECs directly violate Section 254(k) of the Communications Act. This is the only permissible reading of the statutory text, and is fully consistent with the promotion of sound public policy. The excuses that traffic pumping LECs have thus far given as to why their activities do not violate Section 254(k) are simply wrong as a matter of law. The Commission is faced with a direct and willful violation of its enabling statute, and immediate action is necessary to remedy this violation—both to prevent its implementation in the future and to make it crystal clear that entities engaging in past traffic pumping activities are not entitled to remuneration from IXCs in the absence of an express agreement between the traffic pumping LEC and the affected IXC.

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115 *See In re Application of COMSAT Corporation*, Memorandum Opinion and Order, 14 FCC Rcd 3622 at ¶ 8 (1999); *Applications of Communications Satellite Corporation,* 1985 FCC LEXIS 2347 at ¶ 17 (1985); *Satellite Business Systems*, 62 FCC 2d 997 at ¶ 44 (1985).

116 *See Section 254(k) Implementation Order* at ¶ 7.

CenturyLink's suggested language for the traffic pumping "trigger" proposed in the NPRM is consistent with this analysis. By defining "business partner" to include both the LEC itself and separate entities, the rule would appropriately reflect Section 254(k)'s prohibition of unlawful subsidization of competitive services by revenues from non-competitive services.

D. Other Access Stimulation Issues.

Several other issues are raised in the NPRM that merit brief attention. First, the NPRM proposes to require that tariff filings made in order to reflect traffic pumping (that is, reducing rates to take account of the increased volumes caused through traffic pumping) be filed on 16 days notice, depriving them of "deemed lawful" status under Section 204(a)(3) of the Act. While CenturyLink has no problem with this concept, it is shooting at the wrong target. Traffic pumping LECs have been attempting to use the "deemed lawful" provisions of the Act to avoid damages once their rates have been declared to be unlawful.[117] The Commission should confirm in its order that tariffs filed or maintained to initiate or continue an unlawful traffic pumping scheme are in direct violation of the Act and are not subject to protection under Section 204(a)(3), whether filed on 15 days notice or not. When a carrier assesses a charge that is outside its lawful tariff, or in a manner not contemplated by the tariff, "deemed lawful" treatment cannot apply. A tariff that was wholly unlawful even before filing cannot be deemed lawful.

[117] *See Farmers 1* at ¶ 20.

Section 204(a)(3) does not protect a carrier against damages for willful violations of the Act,[118] and the Commission should make this clear.[119]

Second, the traffic pumping problem is not merely a problem to resolve prospectively. It also involves complaints by traffic pumping LECs and injured IXCs.[120] In these cases, traffic pumping LECs are asserting the right to collect for artificially stimulated traffic, and IXCs are seeking damages arising from that same traffic. This proceeding is not the appropriate one to resolve these damages issues and other questions unique to these particular disputes. Nevertheless, the Commission should not artificially seek to limit its decision in this docket to prospective issues. That is, the Commission should not address the issue of what, if any, damages IXCs victimized in the past by traffic pumping are entitled to. That issue is best settled in other proceedings. The Commission, however, should declare that traffic pumping constitutes an unlawful practice under the Act, and not attempt to limit any such declaration to future actions by carriers. Artificial efforts to limit the scope of Commission declarations of the proper

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118 *See ACS of Anchorage*, 290 F.3d 403, 413 (D.C. Cir. 2002), *reh'g & reh'g en banc denied* (No. 01-1059, Aug. 12, 2002). The D.C. Circuit recognized that in "the world of § 204(a)(3), …the rate itself, if filed and not suspended, is 'deemed lawful' [but this appeal did] …not, of course, address the case of a carrier that furtively employs improper accounting techniques in a tariff filing, thereby concealing potential rate of return violations…." The Court added that "[t]he Order [on review] ma[d]e …no such claim of misconduct."

119 The fact that a tariff is "deemed lawful" under Section 204(a)(3) does not insulate a carrier from damages if it seeks to bill under a tariff when the service is not actually covered by the tariff. *See Farmers 3,* 24 FCC Rcd at ¶ 26 n.98 (approving a complaint by the IXC for damages).

120 *E.g.,* Oct. 14, 2010 Public Notice, *supra*, note 68; *Farmers 3,* 24 FCC Rcd 14801; *All American Telephone Co., et al. v. AT&T Corp.,* 26 FCC Rcd 723 (2011).

interpretation of existing laws and regulations are generally harmful and non-productive.[121]

Third, to the extent that the Commission requires that traffic pumping LECs file "cost based" tariffs, the Commission should make it clear that the sharing of access revenues does not constitute a legitimate expense of providing access service. This sharing of access revenues is the basic source of the illegality that underpins traffic pumping. Such sharing cannot be allowed to "self correct," thus aggravating rather than resolving the problem.

CONCLUSION

The current intercarrier compensation system has been the foundation of universal service. CenturyLink shares the NPRM's recognition that the Commission should act to bring about sensible, comprehensive reform of the intercarrier compensation and universal service. It should transition the country to a new and more sustainable regime promoting investment in broadband-capable networks.

In the meantime, and during the transition to comprehensive new rules, the Commission should take immediate, indeed long-overdue, steps to address arbitrage abuses and to minimize disputes that have become too common under the current intercarrier compensation system. The Commission should confirm that IP-on-the-PSTN traffic is subject to existing intercarrier compensation charges under current law. It should adopt rules to stop phantom traffic, by prohibiting mislabeling, masking, or failing to transmit identifying information. And it should adopt sensible rules to stop the unlawful conduct of traffic pumping.

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[121] *See*, *e.g.*, *Qwest Services Corp.*, 509 F.3d at 540-41.

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